FILED
09-123 JUL 21 2009
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JUDY KODRIN AND MICHAEL KODRIN,
PETITIONERS

v.

STATE FARM FIRE AND CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN W. REDMANN

The Law Offices of John W. Redmann LLC
2100 St. Charles Ave.
Commercial Ste. V
New Orleans, LA 70130
(504)433-5550

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

1. The court of appeals ruled that under Louisiana law as long as an insurer relies upon its own engineer's opinion that petitioners' loss of their home from Hurricane Katrina was not covered under their homeowners' policy because it was flood-caused rather than wind-driven, it is not acting in bad faith and cannot be assessed extra damages and attorney's fees under Louisiana law when it wrongfully denies coverage. Does this result overturn settled Louisiana law which penalizes an insurer who acts in bad faith in denying coverage even when it relies upon its own engineer's opinion in doing so, creating unprincipled federal common law on the subject and subverting the policies of comity and federalism announced by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 65(1938)?

2. Did the court of appeals nullify petitioners' right to a jury trial by usurping the jury's finding that respondent had acted in bad faith when it delayed deciding about whether petitioners' homeowners' policy would cover the loss of their home and then eventually denied coverage for the loss as flood-caused rather than wind-driven?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 3

STATEMENT 6

REASONS FOR GRANTING THE PETITION 19

CONCLUSION 32

APPENDIX

Circuit Court of Appeals Opinion 1a
District Court Order & Reasons 22a
District Court Order 35a
Jury Interrogatories 39a
Order Denying Rehearing 44a

TABLE OF AUTHORITIES

Page

CASES

ALDEN V. MAINE, 527 U.S. 706, 754(1999) 26
ARCENEAUX V. AMSTAR CORP., 969 SO.2D 755, 781(LA. APP. 2007) 30
BLAKELY V. WASHINGTON, 542 U.S.296, 305-306(2004) 28
BLOCK V. ST. PAUL FIRE & MARINE INS. CO., 742 SO.2D 746, 752(LA. APP. 1999) 30
BUSH V. GORE, 542 U.S. 692 (2000) 25, 27
CHARGOIS V. GUILLORY, 702 SO. 2D 1068, 1069(LA. APP. 1997) 21
ERIE R. CO. V. TOMPKINS, 304 U.S. 64 (1938) ..... *passim*
FELDER V. CASEY, 487 U.S. 131, 151(1988) 25
FERENS V. JOHN DEERE CO., 494 U.S. 516, 524(1990) 26
GASPERINI V. CENTER FOR HUMANITIES, INC., 518 U.S. 415, 428(1996) 26, 27
GRILLETTA V. LEXINGTON INSURANCE CO., 558 F.3D 359, 369-370(5TH CIR. 2009) 25
GUARANTY TRUST CO. YORK, 326 U.S. 99, 109(1945) 25
HANNA V. PLUMER, 380 U.S. 460, 468(1965) 27
KLAPPROTT V. UNITED STATES, 335 U.S. 601, 611 (1949) 28
LANDRY V. LOUISIANA CITIZENS PROP. INS. CO., 964 SO. 2D 463, 477(LA. APP. 2007 22
LOUISIANA BAG COMPANY, INC. V. AUDUBON INDEMNITY CO., 999 SO.2D 1104, 1114-1115 (LA. 2008) 22
MCNABB V. UNITED STATES, 318 U.S. 332, 341 (1943) 31
MEREDITH V. WINTER HAVEN, 320 U.S. 228, 238(1943) 26
MICHAEL O. LEAVITT V. JANE L., 518 U.S. 137, 144-145(1996) 27, 32
ROGERS V. COMMERCIAL UNION INS. CO., 796 SO.2D 862, 868(LA. APP. 2001) 22
RUHLIN V. NEW YORK LIFE INS. CO., 304 U.S. 202,

208-209(1938) 26
SALVE REGINA COLLEGE v. RUSSELL, 499 U.S. 225, 226(1991) 26, 27
SHER v. LAFAYETTE INS. CO., 988 So.2D 186, 206(LA APP. 2007) 21, 22
SIX COMPANIES v. HIGHWAY DIST., 311 U.S. 180, 188(1940) 26, 27
UNITED STATES v. KIMBELL FOODS, INC., 440 U.S. 715, 730(1979) 26
WEISS v. ALLSTATE INS. CO., 512 F. SUPP. 2D 463, 474(E.D. LA. 2007) 21
WEST v. A.T. & T. CO., 311 U.S. 223, 236-237(1940) 26

STATUTES

28 U.S.C. § 2101(c) 2
28 U.S.C. § 1254(1) 2
La. R.S. § 22:1220 ..... *passim*
La. R.S. § 22:658 ..... *passim*

OTHER AUTHORITIES

1 F. Lane & S. Lane, *Goldstein's Trial Techniques* § 9.02 at 4-5(3d ed. 1991). 31
Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). 29
Burns, Robert P., *The Death of the American Trial*(2009) 29
H. Bodin, *Civil Litigation and Trial Techniques* 110(rev. ed. 1976). 31
Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). 29
The Complete Anti-Federalist 315, 320(H. Storing ed. 1981). 28

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *Judy Kodrin; Michael Kodrin v. State Farm Fire and Casualty Company*, C.A. No.08-30092 consolidated with C.A. No. 08-30169, decided March 11, 2009, affirming the jury's finding of coverage and its award of damages for the loss of petitioners' home and its contents under their homeowners' policy but vacating that portion of the jury's findings which awarded penalties, damages and attorney's fees under La. R.S. § 22:1220 and § 22:658, because of respondent's bad faith, is set forth in the Appendix hereto(App. 1-21).

The unpublished decision of the federal district court for the Eastern District of Louisiana, in *Judy Kodrin; Michael Kodrin v. State Farm Fire and Casualty Company*, U.S. Dist. Court No. 06-8180, filed January 31, 2008, awarding petitioners their attorney's fees and costs because of respondent's bad faith conduct in settling petitioners' claim, is set forth in the Appendix hereto(App. 22-34).

The unpublished decision of the federal district court for the Eastern District of Louisiana, in *Judy Kodrin; Michael Kodrin v. State Farm Fire and Casualty Company*, U.S. Dist. Court No. 06-8180, filed November 21, 2007, awarding $75,000.0 in extra damages to each of the petitioners pursuant to La. R.S. § 22:1220, on account of respondent's bad faith conduct in settling their claim, and ordering petitioners to file a claim for their attorney's fees, is set forth in the Appendix hereto (App. 35-38).

The unpublished jury's answers to interrogatories in *Judy Kodrin; Michael Kodrin v. State Farm Fire and Casualty Company*, U.S. Dist. Court No. 06-8180, finding that respondent engaged in bad faith conduct in settling petitioners' claim, is set forth in the Appendix hereto(App. 39-43).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Judy Kodrin; Michael Kodrin v. State Farm Fire and Casualty Company*, C.A. No. 08-30092 consolidated with C.A. No. 08-30169, decided on April 22, 2009, denying the petitioners' petition for rehearing, is set forth in the Appendix hereto(App. 44).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the jury's finding of coverage and its award of damages for the loss of petitioners' home and its contents under their homeowners' policy but vacating that portion of the jury's findings which awarded penalties, damages and attorney's fees under La. R.S. § 22:1220 and § 22:658, because of respondent's bad faith, was entered on March 11, 2009; and its further order denying the petitioners' timely filed petition for rehearing was filed and decided on April 22, 2009(App. 1-21;44).

This petition for writ of certiorari is filed within ninety (90) days of April 22, 2009. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Louisiana Code of Civil Procedure, Art. 1997:

> An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.

Louisiana Rev. St. § 22:658:

> A. (1) All insurers issuing any type of contract..., shall pay the amount of any claim due any

insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest.

...

(3)....In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant. Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1220.

(4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim.

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefore or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured,...as well as reasonable attorney's fees and costs. Such penalties, if awarded, shall not be used by the insurer in computing either

past or prospective loss experience for the purpose of setting rates or making rate filings.

Louisiana Rev. St. § 22:1220:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverage at issue.

(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.

(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

(4) Misleading a claimant as to the applicable prescriptive period.

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

C. In addition to any general or special damages

> to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater.

STATEMENT

Petitioners Judy Kodrin and Michael Kodrin ("petitioners" or "the Kodrins") owned a home at 177 Holiday Drive in Port Sulphur, Louisiana(App. 2). For yearly fees paid by petitioners, respondent State Farm Fire and Casualty Company ("respondent" or "State Farm") insured petitioners' premises under both a homeowners' and flood insurance policy(App. 3). The limits of coverage under the homeowners' insurance policy were $105,000 for the building; $78,750 for its contents; $10,500 for outbuildings; and reimbursement for actual costs sustained in additional living expenses(App. 3). The flood policy provided coverage limits for the structure in the amount of $56,800 and $19,200 for its contents(App. 3). Both policies were in full force and effect at all relevant times.

On August 29, 2005, the Kodrins' home at 177 Holiday Drive in Port Sulphur, Louisiana, was destroyed by Hurricane Katrina which made landfall just a short distance from there(App. 2). The hurricane winds left the Kodrin residence a pile of rubble. The home's entire roof ended up about 1000 feet away in the direction of the strongest storm winds, which blew well *before* any flood waters arrived. By the time deep-enough flood waters arrived, the winds were then blowing ninety degrees in another direction from the

home(*Id.*)

On September 3, 2005, petitioners notified State Farm by e-mail of their claim. State Farm then attempted to settle the Kodrins' claim on the basis that petitioners' home was destroyed by flooding rather than by wind(App. 15).

State Farm, the largest homeowners' insurer in the Gulf region, including for the Kodrins, was also administering the federally funded National Flood Insurance Protection Plan, as were other insurers, and had such a policy with the Kodrins. As admitted at trial, State Farm not only saved every State Farm policy dollar when a homeowner policy was deemed a flood claim and paid as such in these scenarios, but State Farm also received a commission on every loss check they wrote when they blamed a "wind/flood" loss on flood. Never once did State Farm tell the Kodrins about this conflict of interest which it had—pitting its own vast financial gain in this/every situation against its insureds, thereby "[m]isrepresenting pertinent facts...relatiing to [a] coverage issue"----itself sufficient for a jury to find bad faith and impose penalties under La. R.S. § 22:1220(B)(1), one of the Insurers' Bad Faith laws nullified by the court of appeals' decision herein.

On September 17, 2005, petitioners called State Farm and specifically informed respondent of their belief that wind had destroyed their home, not flooding, and that they wished to pursue a wind claim with State Farm(App. 3).

Respondent took no steps to evaluate petitioners' wind claim until some time between

October 16th and 20th of 2005, and State Farm's adjuster, Patrick Kaminski, visited the Kodrins' property in Port Sulphur(*Id.*). At trial, Kaminski admitted he saw evidence of wind damage and further admitted that he told one or both of the Kodrins that he would "advocate the wind claim on their behalf to State Farm"(Trial Record, Vol. 1, p.186 of Doc. 146). Michael Kodrin was emphatic that Kaminski was clear about the cause being wind and pointed out to him (Kodrin) the twisted bark and broken thick tree limbs by his home above the flood line as proof. But Kaminski "elaborated" at trial that subsequent to that meeting, after he spoke to his supervisor, he advised State Farm not to pay the "wind" claim yet and instead determined to get an engineer involved.

Kaminski's claim activity log for October 20, 2005, reads:

> Inspected property with PH present. Only remains of the insured property is the foundation and brick walls lying about it. Insured insisted the damage is from tornado that dropped during the storm. There is damage to tree adjacent to property, however it is not excessive. [D]iscussed loss with management and it was determined that an engineer should be consulted. Completed engineering request and sent it to my TM.

(Appellate Record at 1049).

Based upon Kaminski's log entry, State Farm hired an engineer (James Danner) to determine the cause of the loss of petitioners' home. By the time State

Farm sent Danner to the Kodrins' property on November 26, 2005, all evidence of the remains of the Kodrins' home had been taken away and Danner never saw its remains so that he could any reach reasonable conclusions about the cause of the loss. More than sixty days after the Kodrins' submitted their initial wind claim to respondent, State Farm's engineer Danner issued his report on December 2, 2005, which concluded:

> *There were structures in the area that received wind damage*, but there was no evidence available to indicate that the insured's residence was damaged by wind prior to being destroyed by the storm surge and moving waters.

As Danner later testified, his opinion was based upon "the evidence that [he] saw out there the day [he] was there, and the day prior to the days I was out there." Danner's report contained no attachments, scientific or otherwise. State Farm accordingly denied the Kodrins' claim on the basis of Danner's report(App.3). In the meantime, State Farm administered its payout to the Kodrins on their flood policy and the Kodrins settled this claim in December of 2005 for the policy limits(*Id.*).

Petitioners then hired their own engineer (Neil Hall) who determined after his investigation that the Kodrins' home was more likely destroyed by wind prior to the arrival of the flood waters. Hall's report together with his testimony at trial contained his conclusion that the flood waters would not have removed the house's roof (which was "strapped" into the building) 1000 feet from the homesite unless the building had collapsed, and that water overtopping the levees would not have possessed sufficient hydrodynamic force to cause a

collapse of the exterior walls of the building. Hall further noted that the report by State Farm's engineer Danner was devoid of any discussion of wind direction or wind speed upon which Danner could determine the existence of wind damage prior to the flooding.

Employing multiple scientific reports about the meteorological conditions at the relevant times together with a reliable scientific system for determining wind damage, Hall concluded that wind caused the Kodrins' total loss and that the damage to their home was of such a nature that it could not have been caused by the water overtopping the levees.

In August of 2006, the Kodrins brought this civil action in the state court of Louisiana against State Farm seeking damages, penalties and attorney's fees and claiming that State Farm had breached the contract of insurance; had exercised bad faith in violation of La. R.S. § 22:1220, for failing to adjust the Kodrins' wind claims fairly and promptly and for failure to make reasonable efforts to settle the claims; and had acted arbitrarily and capriciously in failing to make payments in violation of La. R.S. § 22:658, which had just been amended(App. 3-4). State Farm removed the case to the federal district court for the Eastern District of Louisiana on the basis of diversity of citizenship(App. 4).

In July of 2007, eleven months after the enactment of La. R.S. § 22:658, which imposes significant penalties including attorney's fees on insurers who fail to initiate settlement of property damage claims in a timely manner, and eleven months after bringing suit against State Farm, petitioners

submitted their expert Hall's report to State Farm in an attempt to settle their wind claim. However, State Farm still refused to pay the Kodrins any sum under their homeowners' insurance policy.

During a two-day trial in November of 2007, State Farm's adjuster Kaminski admitted he saw evidence of wind damage to the Kodrins' home *and* neighborhood, and that he intended to "advocate the claim to State Farm that way." At trial, he admitted he said this to the Kodrins, and even the trial judge remarked, "It sounds like [Mr. Kaminski] is not disputing it a bit." Yet, after telling the Kodrins' about his intended advocacy, the evidence showed that Kaminski went back to his office and on or about the same day wrote a report which was obviously not "advocating" any "wind" or covered claim on behalf of the Kodrins, a position quite different than what he represented to the Kodrins.

Mr. Kaminski's misrepresentation to the Kodrins that he would "advocate" their claim to State Farm while then turning around and not doing so was bad faith conduct within the meaning of La. R.S. §§ 22: 658 & 1220(B)(1). The latter statute states in pertinent part that an insurer such as State Farm "owes to his insured a duty of good faith and fair dealing and "misrepresenting pertinent facts...relating to any coverage at issue" constitutes a breach of the insurer's duty of good faith and fair dealing.

But what was far worse, and what Kaminski also admitted, was that he never bothered to mention to the Kodrins that while he was there to adjust *both* their flood *and* the wind/homeowners' claim, State Farm's

stake in the outcome of his "analysis" was extremely weighty. In other words, if he concluded that this approximately $200,000.00 homeowners' claim was caused by flood (or even if it was caused concurrently with flooding), then he could save State Farm all of that money, and write a flood claims check out of the U.S. Treasury *and* get State Farm a *commission* on every flood check they wrote. And that conflict of interest was part and parcel of his, and every, State Farm (and other) adjuster's job, involving this and all of the hundreds of thousands of claims involving wind (which arrived, typically, hours earlier) versus flood causation claims.

In addition, as Kaminski admitted at trial, he and other State Farm adjusters were repeatedly trying to get the Kodrins to accept the far lower flood policy limits (about one-third of the wind policy) and no one from State Farm ever bothered to mention that accepting these funds may jeopardize the wind policy claim (as State Farm did try to argue in its defenses, e.g., anti-concurrency, etc, but to no avail since the jury determined that the house was destroyed by wind long before flooding arrived). Luckily, despite really needing funds after losing their home, work and due to medical issues with Mrs. Kodrin, Mr. Kodrin was not hoodwinked, and did not accept flood funds until later, and only after getting legal advice on how to do so and still protect his family's rights.

This outrageous conflict of interest and the fact that Kaminski and every other State Farm adjuster and other representative dealing with the Kodrins was really created by State Farm itself in sending out one adjuster. This conflict of interest, never told the

Kodrins, was like the misrepresentations of Kaminski bad faith conduct of the insurer within the meaning of La. R.S. §§ 22: 658 & 1220(B)(1).

As to State Farm's violations of Louisiana's bad faith laws regarding the insurer's duty to properly adjust claims, the evidence also showed that Danner's report—a mere 252 words or so--- on behalf of State Farm was based on virtually *no investigation at all*, certainly not enough to form a factual basis which would reasonably have permitted State Farm to disclaim coverage based upon its conclusions. Moreover, when Danner finally arrived at the Kodrins' property in late November, 2005, all evidence of the remains of the Kodrins' home had been taken away and Danner never saw its remains so that he could reach any reasonable conclusions about the cause of the loss.

For example, if Danner had visited the Kodrin homesite sooner than late November, 2005, he would have observed that unlike the many flood-damaged homes in the neighborhood which were pushed off their foundations and moved by the water relatively intact to a common point down the road, the Kodrins' home was reduced to rubble with the roof deposited 1000 feet away, in the opposite direction from where the flooding had gathered some rubble and debris and deposited it at some point in the weeks-long flooding following the storm. As Danner testified, he "had nothing to look at to determine whether or not there was wind damage" and there "wasn't any evidence left for him to quantify wind damage prior to the storm surge."

As he told the Kodrins, because of this lack of evidence -caused by State Farm's own foot-dragging

in getting him to the property in a timely manner----he had to rely upon the conclusions of the adjuster Kaminski about there being no evidence of wind damage. However, it was Kaminski's own report which prompted State Farm to hire Danner to inspect the property in the first place! Moreover, Danner's report incorporated no attachments, scientific studies, government data, meteorological surveys or other information. Yet Danner nonetheless concluded in his report that "the structure was completely destroyed by moving waters."

Even though State Farm should have known that Danner's bald report lacked any badge of personal analysis as to the cause of the damage, was bereft of any investigative facts such as wind speed, flood dynamics, weather information etc., and itself provided no basis in fact for its conclusions that flooding caused the loss because it was demonstrably based upon *no evidence at all*, State Farm relied upon Danner's report to deny coverage to petitioners under their homeowners' policy. Thus the Kodrins argued that State Farm's reliance upon Danner's baseless and self-serving engineering report to deny them homeowners' coverage for the wind-driven damage to their home was made in bad faith and was done arbitrarily, capriciously, or without probable cause within the meaning of La. R.S. § 22:1220.

Besides this proof which went directly to the integrity and reliability of Danner's report, there was compelling evidence adduced at trial by the Kodrins that State Farm was aware of substantial wind damage not only to the Kodrins' home but also other homes in the neighborhood. State Farm's own witnesses testified

that other properties in the area were damaged by wind from Katrina and that there was wind damage to the Kodrins' property *above the floodline*. For example, Kaminski took photographs of massive oak tree limbs broken *above* flood height on the Kodrins' property.

Danner further testified that prior to inspecting the Kodrins' property in late November of 2005, he had inspected ten other properties in the area and of those ten properties, "there was a combination of all [types of damage] some destroyed by flood, some having flood and wind damage, and some having primarily wind damage and some flood." Even Kaminski testified that he saw "some evidence of [wind] damage in trees,...if not tornadoes"(Appellate Record at 2250;2073). Elaborating on this with reference to one of the photographs he took of a wind-damaged tree, Kaminski asserted that this apparent wind damage was "one of the reasons [State Farm] agreed to have an engineer go out"(Appellate Record at 2212). Michael Kodrin corroborated this testimony by testifying that Kaminski had told him that he (Kaminski) "saw a lot of wind damage and... there was a lot of wind damage to the house"(Appellate Record at 2072).

Finally, the evidence was overwhelming that State Farm took too long to initiate an adjustment of the Kodrins' loss and then waited too long—well over the thirty-day and sixty-day periods of La. R.S. §§ 22:658 and1220, respectively----to complete the coverage assessments of the Kodrins' wind clams. The jury heard evidence that, as adverted to *supra*, the Kodrins first reported their loss on September 3, 2005, and for the ensuing three weeks they called State Farm on multiple occasions unsuccessfully in order to speak

to a representative in order to clarify their position that their loss should be classified as one under their homeowners' coverage (wind-caused) rather than under their flood coverage. Kaminski's first inspection was on October 20, 2005, and by October 24, 2005, the Kodrins first learned that State Farm needed to consult an engineer before it could decide whether to provide coverage beyond the flood policy.

It was not until November 11, 2005, that the Kodrins learned that State Farm had assigned a new adjuster (Shagg Peterson) to handle their wind claims. On November 26, 2005, State Farm's consulting engineer Danner inspected the property and produced a report on December 2, 2005, which State Farm used to refuse homeowners' coverage to the Kodrins on December 3, 2005. When the Kodrins retained an attorney who demanded payment on their behalf in writing on December 13, 2005, State Farm continued to refuse coverage and the Kodrins brought suit in August of 2006.

With the evidence in this posture and in response to special questions, the jury found that wind caused the Kodrins' damage to their home and its contents, awarding them a full recovery up to the policy limits plus $9,737 for additional living expenses(App. 4;39-40). In addition, the jury determined from all the evidence that State Farm's refusal to settle the Kodrins' claims within sixty days of receiving a satisfactory proof of loss was arbitrary, capricious or without probable cause, entitling each of the Kodrins to $25,000 in damages and another $50,000 each as a penalty to State Farm for its bad faith conduct(App. 4;41-42).

The district judge then adjusted the damage award to reflect Louisiana law that a plaintiff may not recover a penalty under both statutes but rather may recover the higher penalty of the two (App. 36). Because State Farm's bad faith conduct took place both before and after the August 15, 2006, amendment of La. R.S. § 22:658, entitling them to attorney's fees as well, the district judge applied the statute prospectively and entered a final judgment for the Kodrins on November 21, 2007, together with directions that their attorneys file a properly supported motion for attorney's fees and costs. State Farm filed a timely notice of appeal therefrom(U.S.C.A. Docket No. 08-30092)(App. 38).

On January 31, 2008, the district judge awarded petitioners $130,774.69 in attorney's fees and $8,459.70 in costs under La. R.S. § 22:658(App. 22-34). State Farm filed another timely notice of appeal therefrom(U.S.C.A. No. 08-30169).

Both of these appeals by State Farm were consolidated by the court of appeals for hearing and on March 11, 2009, the Court of Appeals for the Fifth Circuit in a *per curiam* opinion ruled that the Kodrins had failed to adduce sufficient evidence at trial of State Farm's bad faith conduct in denying them coverage under their homeowners' insurance policy(App.1-21).

Restating the general principle that an insurer does not act arbitrarily or capriciously when its refusal to pay is based upon a genuine dispute over coverage or the amount of the loss, the court of appeals then concluded:

> *There were structures in the area that received wind damage,* but there was no evidence available to indicate that the insured's residence was damaged by wind prior to being destroyed by the storm surge and moving waters.

(App. 13)(footnote omitted)(emphasis supplied).

While affirming the jury's findings of coverage and its award of damages for the loss of the Kodrins' home and its contents under their homeowners' policy, the court of appeals vacated the jury's award of damages and penalties under La. R.S. § 22:1220, as well as the district judge's award of attorney's fees under La. R.S. § 22:658, as amended, resulting from the jury's finding of bad faith(App. 14-15).

On April 22, 2009, the court of appeals denied petitioners' timely filed petition rehearing (App. 44).

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Refusal To Give Louisiana's Statutory and Decisional Law The Adjudicatory Force It Deserves When An Insurer Wrongly Denies Coverage for A Loss Undermines the Principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Is Tantamount to A Repeal of The Relevant Statutes, And Allows An Insurer To Insulate Itself From Liability For Its Bad Faith Conduct Simply By Producing An Expert Who Agrees With Its Wrong Decision, Encouraging Further Misconduct By Insurers.

The court of appeals' decision holds that under Louisiana law as long as an insurer relies upon its own engineer's opinion that petitioners' loss of their home from Hurricane Katrina was not covered under the policy because it was flood-caused rather than wind-driven, it is not acting in bad faith and cannot be assessed extra damages, penalties and attorney's fees under Louisiana law when it denies coverage. This ruling rewrites settled Louisiana statutory and decisional law about when an insurer acts in bad faith and when it should be penalized under La. R.S. §§ 22:658;1220, for this bad faith conduct in postponing unreasonably the settlement of a valid claim after its receipt of satisfactory proof of loss and in ultimately denying coverage of such a valid claim.

This decision's breadth threatens homeowners-insureds potentially by the hundreds of thousands—ostensibly protected by insurer bad faith laws not only in Louisiana but also anywhere in the federal Fifth Circuit, as it disallows for a finding of bad faith by an

insurer thanks to a "Hired Gun Immunity," encouraging insurers to obtain opinions of engineers or other "experts" to support their decisions denying coverage, no matter how unfounded or unfair to the insured, without ever suffering any penalty for this outrageous conduct.

The decision also creates unprincipled federal common law in Louisiana on the subject of whether an insurance company can be held liable for extra damages, penalties and attorney's fees for acting arbitrarily, capriciously and without probable cause in denying coverage. This is especially unfortunate for the inhabitants of a state which has endured—and will continue to endure---the ravages of extreme weather and where insurance companies have the opportunity to accommodate these known risks in their pricing *before* the loss occurs. Letting this decision stand subverts the policies of comity and federalism identified by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 65(1938), and deprives Louisiana statutory and decisional law addressing this precise subject of the adjudicatory force it deserves.

Furthermore, this decision reinterpreting the definition of an insurer's "bad faith" conduct under Louisiana law in this *post*-Katrina environment is a clarion call to insurance companies to have their actionable decisions denying coverage insulated from penalty and further liability by simply producing a paid expert who will buttress its decision denying coverage, however wrong, despite receiving satisfactory proof of loss from the insured establishing a presumptively valid claim within the meaning of §§ 22:658(A) and 1220(B)(5). The ruling gives the insurance companies

carte blanche to convert every actionable decision denying coverage despite satisfactory proof of loss into "a genuine dispute over coverage or the amount of the loss," as the court of appeals' benign analysis suggests(App. 12-13), where no liability attaches. It is tantamount to the repeal of La. R.S. §§ 22:658;1220, and the enforcement machinery which has developed around these statutes to address the problem of insurance companies who refuse to acknowledge their duties to the insured of good faith and fair dealing under these statutes.

The conduct prohibited by La. R.S. § 22:658(A) is practically identical to the conduct proscribed by La. R.S. § 1220(B)(5): the failure by the insurer to timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious or without probable cause. One who claims entitlement to penalties and attorney's fees has the burden of proving that the insurer received satisfactory proof of loss as a predicate to a showing that the insurer's ensuing denial of coverage was arbitrary, capricious or without probable cause. *Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 206(La. 2008). *Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 474(E.D. La. 2007) (applying Louisiana law). Moreover, both of these statutes impose upon insurers a duty of good faith and fair dealing, specifically to "adjust claims fairly and promptly and to take reasonable steps to settle valid claims." *Chargois v. Guillory*, 702 So. 2d 1068, 1069(La. App. 1997). These duties imposed on insurers in Louisiana in particular and the Gulf Region generally take on special significance in the wake of Hurricane Katrina, a catastrophe for not only Louisiana but also all of the Gulf States. *Sher*, 988 So.2d at 209(Knoll, J., concurring

and dissenting).

Whether an insurer has lived up to these duties in this case "must turn on its own facts which are left for the trier, judge or jury, to resolve....This has been the jurisprudence of the courts in [Louisiana], including the Louisiana Supreme Court, for well over sixty years." *Landry v. Louisiana Citizens Prop. Ins. Co.*, 964 So. 2d 463, 477(La. App. 2007). See also *Sher*, 988 So.2d at 207. Thus if the evidence showed that State Farm's refusal to provide coverage was not based upon a good faith defense or that it was not reasonably prompt in initiating loss adjustment for the Kodrins, the trier of fact will find that it acted arbitrarily, capriciously or without probable cause, exposing the insurer to the extra damages, penalties and attorney's fees under La. R.S. §§ 22:658;1220. See *Louisiana Bag Company, Inc. v. Audubon Indemnity Co.*, 999 So.2d 1104, 1114-1115; 1118-1120 (La. 2008); *Rogers v. Commercial Union Ins. Co.*, 796 So.2d 862, 868(La. App. 2001).

The Kodrins' evidence which the jury heard was overwhelming on each score. Petitioners submitted their expert Hall's comprehensive 42-page report to State Farm in July of 2007 in an attempt to settle their wind claim. Employing multiple scientific reports about the meteorological conditions at the relevant times together with a reliable scientific system for determining wind damage, Hall concluded persuasively and with documentation that wind caused the Kodrins' total loss and that the damage to their home was of such a nature that it could not possibly have been caused by the water overtopping the levees.

State Farm, however, still refused to provide coverage under its homeowners' insurance policy, relying upon Danner's report, one which contained no facts at all and one which incorporated no attachments, no scientific studies, no government data, no meteorological surveys or any other information. In fact, because Danner never saw the homesite as it existed in the wake of the storm, his "expert" opinion actually relied upon the conclusions of the adjuster Kaminski about there being no wind damage; yet it was Kaminski's own report which prompted State Farm to hire an engineer (Danner) to inspect the property in the first place! The jury also heard other proof that State Farm was aware of substantial wind damage to not only the Kodrins' home but also other homes in the neighborhood.

Besides this, the jury heard evidence that State Farm took too long to initiate adjustment of the Kodrins' loss and then waited too long—well over the thirty-day and sixty-day periods of La. R.S. §§ 22:658;1220, respectively----to complete the coverage assessments of the Kodrins' wind clams. It also failed to provide coverage after the Kodrins submitted their own expert's report in July of 2007 showing persuasively that the loss was caused by wind rather than flooding.

And the jury heard State Farm's corporate representative admit that in many cases such as this, State Farm's adjuster adjusted both their own "wind" claim and the federally underwritten "flood" claim, and that, if their own adjuster's conclusion was that it was flood damage, State Farm's coffers remained untouched and it was paid a commission whenever it paid a flood

insurance check to a homeowner. He further testified that no one at State Farm ever told the Kodrins anything about this conflict of interest while State Farm was being a "Good Neighbor" who "fairly and equitably" adjusted their claim. Nor did anyone at State Farm tell the Kodrins about the risks associated with flood payments.

Thus the jury's finding that State Farm had engaged in arbitrary, capricious and bad faith conduct stemmed not only from State Farm's reliance on Danner's baseless, self-serving report but also from all of its other unfair conduct in avoiding payment of the Kodrins' wind claim: its foot-dragging conduct in initiating adjustment; its failure to apprehend and detail the physical facts showing wind damage at the site; its refusal to commission an engineer's opinion in a timely manner; and its unwillingness to provide coverage of a valid claim even after the Kodrins had submitted satisfactory proof of loss. This conduct exceeded by far the conduct of an insurer found actionable under La. R.S. §§ 22:658 and1220, by a different three-judge panel of the same court of appeals earlier in *Grilletta v. Lexington Insurance Co.*, 558 F.3d 359, 369-370(5th Cir. 2009).

While this intra-circuit conflict is not alone sufficient to warrant this Court's grant of the petition, the court of appeals' refusal to give Louisiana statutory and decisional law the adjudicative force it deserves to resolve this controversy undermines the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938), and permits insurance companies who have invoked the federal court's diversity jurisdiction to avoid the full weight of §§ 22:658 and 1220, the decisional law

accompanying it and the penalties attendant in Louisiana to the breach of its duty to insureds of good faith and fair dealing.

Under *Erie*, when a federal court exercises diversity, pendent or supplemental jurisdiction over state law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742(2000)(Rehnquist, C.J., concurring).

As this Court explained in *Erie*,

> the Constitution of the United States [including the Tenth Amendment]...recognizes and preserves the autonomy and independence of the States----independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a

denial of its independence.

304 U.S. at 78-79. See *Alden v. Maine*, 527 U.S. 706, 754(1999)(our federal system bespeaks the fact that the various States remain sovereign entities whose judicial independence must be respected by Article III courts).

Erie is a vital expression of our federal system and mandates that a federal court sitting in diversity jurisdiction over these suits apply the substantive law of Louisiana, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428(1996). *Salve Regina College v. Russell*, 499 U.S. 225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York*, *supra*. *Gasperini*, 518 U.S. at 430-431.

In addition, this Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner by which they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell*, *supra*, quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209(1938). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237(1940); *Six*

Companies v. Highway Dist., 311 U.S. 180, 188(1940).

Moreover, in view of the court of appeals' affirmative duty under the decisions of this Court to review independently and then correct the district court's determination of state law when fixing the rights of the parties, *Erie, supra*; *Salve Regina College v. Russell*, 499 U.S. at 231; 234, it was incumbent on the court of appeals to carry out this task so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*— "discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468(1965)— were accomplished. *Gasperini, supra.*

However, the court of appeals failed in this fundamental regard. Creating federal "general" common law at odds with the substantive law of Louisiana in order to reach a particular result, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726(2004), it wrongly deprived petitioners of the jury determination after trial that State Farm had engaged in arbitrary, capricious and bad faith conduct not only by relying on Danner's baseless, self-serving report but also by engaging in other unfair behavior which sabotaged the Kodrins' wind claim at every turn.

This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145(1996), is a matter which invokes this Court's power of superintendency over the federal courts so that the decision below does not damage federal-state relations, does not lead to divergent opinions on the quantum of evidence necessary under Louisiana law to prove

violations of La. R.S. §§ 22:658;1220, an enormously significant interest to the people of Louisiana, especially *post*-Katrina, and does not promote forum shopping, all considerations which prompted this Court to decide *Erie* in the first place.

2. The Court of Appeals Denied Petitioners Due Process Of Law By Weighing Evidence and Finding Facts In Order to Dispose of Factual Issues Central To Respondent's Bad Faith Conduct, Fact Issues Which the Jury Had *Already* Decided, Usurping The Jury's Factfinding Function, Nullifying Its Verdict And Denying Petitioners The Jury Trial Guaranteed Them By the Seventh Amendment.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is no mere procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

One of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy. However, both federal jurists

and legal commentators have noted that federal trial judges regularly weigh the evidence themselves and take triable cases away from juries when, for example, deciding summary judgment motions. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). See Burns, Robert P., *The Death of the American Trial*(2009).

So too the court of appeals here has taken this case away from the jury by deciding for tiself crucial fact question bearing on this dispute----but only *after* the jury has already decided these fact questions after hearing all of the evidence. The jury determined that State Farm engaged in arbitrary, capricious and bad faith conduct as the result not only of State Farm's flagrant conflict of interest in self-dealing (finding flood damage and conveniently writing a check out of someone else's bank account, i.e., the U.S. Treasury, not telling the insured about the possible policy-annulling risks in accepting flood funds but also its secret reliance on Danner's baseless, self-serving report to deny coverage. In addition, there was other probative evidence of State Farm's unfair conduct in avoiding payment of the Kodrins' wind claim: its foot-dragging conduct in initiating adjustment; its failure to apprehend and detail the physical facts showing wind damage at the site; its refusal to commission an engineer's opinion in a timely manner; and its unwillingness to provide coverage of a valid claim even after the Kodrins had submitted satisfactory proof of

loss.

> Yet, in Louisiana
>
> > [t]he determination of whether an insurer acted in bad faith turns on the facts and circumstances of each case. This is because a prerequisite to any recovery under the statute is a finding that the insurer not only acted (or failed to act), but did so arbitrarily, capriciously, or without probable cause. As this determination is largely factual, great deference must be accorded the trier of fact...*[and] an appellate court may not set aside [a jury's] finding in the absence of manifest error....*

Block v. St. Paul Fire & Marine Ins. Co., 742 So.2d 746, 752(La. App. 1999). *Accord, Sher v. Lafayette Insurance Co.*, 973 So.2d 39, 60-61(La. App. 2007); *Arceneaux v. Amstar Corp.*, 969 So.2d 755, 781(La. App. 2007).

The court of appeals violated this fundamental rule of appellate review and overrode Louisiana law of manifest error by finding facts at odds with the jury's verdict and determining on this record----absent a showing of manifest error----that "[t]he only evidence that the Kodrins offered to demonstrate that [State Farm's] denial was in bad faith is the fact of the denial itself and their expert's testimony that wind actually caused the damage to the home"(App. 13). This blunt, incomplete depiction of the evidence the jury heard about State Farm's unfair behavior is demonstrably untrue because it ignores the Kodrins' proof detailed here; because it usurps the jury's function and deprives

petitioners of the jury trial to which they were entitled under the seventh amendment; and because it denies petitioners due process of law.

Especially in insurance litigation of this type and certainly in the aftermath of Hurricane Katrina and the turmoil which ensued concerning insurance coverage, "the 'little guy' has an advantage with a jury whether he is defending or prosecuting a case against...an insurance company." 1 F. Lane & S. Lane, *Goldstein's Trial Techniques* § 9.02 at 4-5(3d ed. 1991). See H. Bodin, *Civil Litigation and Trial Techniques* 110(rev. ed. 1976). The Kodrins won their suit against State Farm by proving to a jury that the insurer had not treated it fairly or equitably, that it had acted arbitrarily and capriciously on many fronts and that it had denied coverage under their homeowners' policy even in the face of satisfactory proof of loss. Serial violations of La. R.S. §§ 22:658 and1220, had therefore been made out and petitioners deserve the benefit of the jury's verdict. It should not have been taken away from them by the federal court of appeals.

This Court has the responsibility in its superintendency role over the federal courts and the federal system to formulate the controlling rules for hearings and proof in order that those rules of procedure provide all of the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341 (1943).

Petitioners respectfully submit that on a scale on par with Hurricane Katrina, the potential, if not likely, ramifications of the decision here, especially in the

event of another natural calamity, may well be epic in proportion. Especially if insurers are emboldened with "hired Gun immunity," not to fear the bad faith laws of the several States, formulated as consumer protection laws, whereby juries are holding them accountable, then the worst abuses of the insurance industry will surely reemerge.

Many Hurricane Katrina insurance victims are still waiting to have a jury of their peers decide their cases. The court of appeals' decision below threatens to nullify decades of progress and voluminous laws proscribing bad faith conduct by insurers. While this Court "does not normally grant petitions for certiorari solely to review what purports to be an application of state law..., we have done so and undoubtedly should do so where the alternative is allowing the blatant federal-court nullification of state law. *Michael O. Leavitt v. Jane L., supra.*

This Court should therefore exercise this power to vacate the court of appeals' factfinding which is at odds with the jury's verdict and reinstate the jury's verdict in petitioners' favor.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Eastern District of Louisiana, with instructions to reinstate the original judgment based on the jury's verdict and its answers to the district judge's

special questions; or provide petitioners with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

John W. Redmann
The Law Offices of John W. Redmann LLC
2100 St. Charles Ave.
Commercial Ste. V
New Orleans, LA 70130
(504)433-5550

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

(any footnotes trail end of each document)

No. 08-30092, consolidated w/08-30169
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUDY KODRIN; MICHAEL KODRIN,
Plaintiffs - Appellees
v.
STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Appellant

March 11, 2009, Filed

NOTICE:PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Eastern District of Louisiana. USDC No. 2:06-CV-8180.

COUNSEL: For JUDY KODRIN, MICHAEL KODRIN, Plaintiff - Appellees: John W. Redmann, New Orleans, LA; Margaret Elizabeth Madere, Madere & Associates, New Orleans, LA

For STATE FARM FIRE & CASUALTY CO, Defendant - Appellant: William Ryan Acomb, Michele Lynn Trowbridge, Porteous, Hainkel & Johnson, New Orleans, LA; Clarke Benbow Holland, LHB Pacific Law Partners, Emeryville, CA; Katherine B. Armstrong, Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom, New York, NY.

Before KING, HIGGINBOTHAM, and WIENER, Circuit Judges.

OPINION

PER CURIAM: *

The home of Plaintiffs-Appellees Judy and Michael Kodrin in Port Sulphur, Louisiana, was demolished in Hurricane Katrina. The Kodrins' insurer, Defendant-Appellant State Farm Fire and Casualty Co. ("State Farm"), denied coverage on their Katrina-related claim, asserting that the damage was excluded from coverage under the policy because it was caused by flooding rather than wind. The Kodrins sued State Farm for coverage. A jury sided with the Kodrins and awarded them $ 356,318 in damages and penalties, plus attorneys' fees and costs. State Farm appeals the judgment. We affirm in part and vacate in part.

I. FACTS AND PROCEEDINGS

When Judy and Michael Kodrin returned to their Port Sulphur, Louisiana, home following Hurricane Katrina in 2005, they found nothing but a concrete slab and debris. Their home and its contents were gone. All that remained was their damaged roof, which lay about 1,000 feet away. Many of the homes in their neighborhood had been separated from their foundations by floodwaters, carried off, then collected together in one area. These other residences had been severely damaged, but remained relatively intact, in contrast to the Kodrins' home, which had been reduced to rubble. Because the damage to their home appeared different from that suffered by the other homes in the

neighborhood, the Kodrins concluded that theirs was destroyed by something other than the massive flood that occurred when a nearby levee overtopped. They speculated that a tornado had been spawned during the storm and had demolished their house before the floodwaters arrived.

The Kodrins held homeowner's and flood insurance policies issued by State Farm.[1] The limits of coverage under the homeowner's policy were:

> Coverage A (Building, i.e., home) -- $ 105,000
> Coverage B (Contents) -- $ 78,750
> Coverage C (Outbuildings) -- $ 10,500

The coverage limit under the flood policy was $ 76,000.

The Kodrins notified State Farm of their homeowner's claim for wind damage on September 17, 2005. A State Farm adjuster inspected the property in mid-October and told the Kodrins that he would inform their insurer that they intended to make a claim for wind damage. State Farm sent a second adjuster to the property on November 26, 2005, the day after the remaining debris had been cleared away. In the meantime, State Farm was administering the payout on the flood policy.[2] The Kodrins settled that claim in December for the policy limit. At about the same time, State Farm had denied the wind damage claims that the Kodrins had submitted under the homeowner's policy.

The Kodrins filed suit in August 2006 claiming, *inter alia*, (1) breach of contract; (2) bad faith under Louisiana Revised Statute § 22:1220 ("R.S. 22:1220") for failure to adjust claims fairly and promptly and for

failure to make reasonable efforts to settle the claims; and (3) arbitrary and capricious failure to make payment in violation of Louisiana Revised Statute § 22:658 ("R.S. 22:658"). State Farm removed the case to the Federal District Court for the Eastern District of Louisiana on the basis of diversity of citizenship.[3]

Following a two-day trial in November 2007, a jury found that wind was the cause of the damage to the home and its contents. The jury awarded the Kodrins a total of $ 196,581, essentially the maximum aggregate amount under the applicable classes of homeowner's coverage, plus $ 9,737 for additional living expenses,[4] $ 25,000 each to Judy and Michael Kodrin for State Farm's arbitrary and capricious failure to pay within 60 days, and $ 50,000 each as penalties for that failure, finding State Farm liable under both R.S. 22:658 and 22:1220. The district court also entered judgment in favor of the Kodrins for attorneys' fees and costs in the amount of $ 139,234 pursuant to R.S. 22:658.[5] State Farm moved for judgment as a matter of law or to alter and amend the judgments, which motions were denied. State Farm timely filed its notice of appeal.

II. ANALYSIS

State Farm raises a number of issues on appeal, each of which falls into either of two general claims of error: (1) The district court improperly instructed the jury, and (2) the Kodrins failed to offer legally sufficient evidence for a jury to find that State Farm acted in bad faith. In a diversity suit, we apply the substantive law of the forum state, in this case, Louisiana. [6]

A. Jury Instructions

State Farm contends that the jury instructions on the question of wind damage were erroneous because the district court failed to instruct the jury that (1) the Kodrins could recover only if their damage was caused *exclusively* by wind, and (2) the Kodrins had the burden of proving that the damage to the contents of their home was caused by wind.

1. Standard of Review

We review for abuse of discretion whether a jury was properly instructed.[7] "In diversity actions, a federal court's jury instructions must accurately describe the applicable state substantive law, but the district court has wide discretion in formulating the charge."[8] We will reverse "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations."[9] Even if we find error, "we will not reverse if we determine, based on the entire record, that the challenged instruction could not have affected the outcome of the case."[10]

2. Exclusivity of Wind Damage

The Kodrins' homeowner's policy insured their home and its contents against wind damage, but did not provide coverage for damage caused by flooding. Policies of this sort are common and have been much-litigated in the wake of Hurricane Katrina and other recent storms. We have held that a homeowner may recover under such a policy only when wind is the *exclusive* cause of the damage.[11] The Kodrins insist that Louisiana courts do not read the provision so restrictively; rather, that they hold that coverage under a homeowner's policy is available if flooding is not the

"proximate or efficient cause" of the damage.[12] We acknowledge the existence of tension between the relevant case law of this circuit and that of the Louisiana intermediate courts, but we are bound by our own precedent.[13] Moreover, in this case, we view the distinction as being of little import. First, the divergent interpretations of this court and the Louisiana courts matter mainly when two forces, such as flood and wind, act together to cause damage. Here, there is no role for such a middle ground: Neither party maintained that wind and flood acted in some combination, only that one or the other caused all the damage. As a result, the jury's only options were 100 percent wind or 100 percent flood.[14] It was not presented with facts on which to determine that some combination of the two forces caused the damage, and it was not asked to decide on such a basis.

Second, our holding in *Bilbe* creates a stricter rule than the Louisiana appellate court's *Landry* holding and thus is more favorable to State Farm -- indeed, State Farm asserts that under *Bilbe* we must reverse. When we apply *Bilbe*, however, the jury instructions survive, so that even if we could consider *Landry*, we would not need to reach the issue. Thus, following *Bilbe*, the Kodrins could recover under their homeowner's policy only if the jury should find that wind alone, and not flooding at all, caused their loss. Conversely, if the jury should find that flooding destroyed the home, the policy's exclusionary clause would bar recovery.[15]

State Farm claims that the wording of the jury instructions vitiated the effect of the policy's flood exclusion by failing to make clear the all-or-nothing requirement of the homeowner's policy -- as outlined in

Bilbe. After stating that the Kodrins had the burden to prove that their claim was covered by the policy, the district court instructed the jury:

> State Farm argues that it properly refused payment to the Kodrins based on its determination that the damage to plaintiffs' property was caused by water, which falls under the flood exclusion in plaintiffs' homeowner's policy, and not by wind. Under Louisiana law, State Farm bears the burden of proving the applicability of any exclusionary clause contained in its insurance policy by a preponderance of the evidence. If you find that State Farm has met its burden of proving by a preponderance of the evidence that the property damage claimed by the Kodrins was caused by a non-covered peril, such as flooding, then State Farm is not liable to plaintiff for any damages under the policy.

State Farm complains that this instruction did not allow the jury to reach a third conclusion, *viz.*, that both wind and flood contributed to the damage and that, if this were the case, the Kodrins could not recover at all.

We are satisfied that the jury instruction correctly and unambiguously recited the law applicable in this case: If flood caused the damage "then State Farm is not liable." Again, neither State Farm nor the Kodrins contended at trial that a combination of wind and flood destroyed the Kodrins' home. State Farm insisted that flooding was the sole cause; the Kodrins were equally insistent that wind was the sole cause. The district court correctly observed that a complicated instruction addressing the combination of the two forces would be

likely to do more harm than good, causing confusion by attempting to address a fact pattern not before the jury. As the parties claimed only that either wind alone or flood alone destroyed the home, it is they, not the court, who left the jury no way to find that the damage was caused by some combination of the two.

3. Jury Interrogatories

State Farm also complains that the jury interrogatories compounded the problem by asking only about wind. The first interrogatory asked: "Do you find by a preponderance of the evidence that Mrs. Kodrin sustained wind damage to her home?" The ensuing questions regarding other structures on the property and the contents of the home were worded identically.[16] If the jury answered the first questions for each category of property in the affirmative, the next interrogatory asked: "What amount does State Farm owe Mr. and/or Mrs. Kodrin for wind loss to their property?" The verdict form divided this question by type of property: dwelling, other structures, dwelling contents, and additional living expenses.

We can see that, if viewed in a vacuum, the interrogatories might be confusing, but we are comfortable that on the basis of the discrete facts of this case and the way it was tried by the parties, they were not. First, as already discussed, neither side presented its case on a theory that wind was a *contributing* factor; wind either did or did not cause the damage entirely, depending on which party's version was accepted by the jury. This issue was central during the trial: State Farm argued vigorously that flooding caused the damage and for that reason, the Kodrins could not

recover; the Kodrins argued the reverse. The jury was never presented with facts that would permit it to find that the wind caused some but less than all the damage or that flood caused some but less than all the damage, which is the concern State Farm raises. Additionally, the jury charge itself made clear that if flooding caused the damage, recovery was barred. As a result, the jury could answer the interrogatories affirmatively and find in favor of the Kodrins if -- but only if -- it found that flooding did not contribute to the destruction of the Kodrins' property. We always presume that jurors follow the instructions given by the trial court,[17] and State Farm offers no argument to persuade us to abandon this well-established presumption here.

The district court has broad discretion in formulating jury instructions, and in this case offered a sound rationale for its choice. State Farm must demonstrate that the language creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations."[18] Instead, its argument rests on the contention that the district court omitted an instruction regarding an argument not made by either side at trial. "In reviewing a trial judge's instruction to a jury, we must look at the charge as a whole."[19] When taken together and in context, the district court's instructions and interrogatories amply state the applicable law. As such, the trial court acted well within its discretion.

4. Burden of proof

Even though State Farm had the burden of proof that the damage to the Kodrins' home was excluded from coverage, the Kodrins had the burden of proof at all times with respect to coverage of their contents. Unlike

the policy provision for coverage of the structure, the provision for coverage of its contents was on a so-called "named-peril basis," meaning that the contents of the Kodrins' home were covered *only if* they were damaged by an enumerated cause. "Windstorm or hail" were enumerated causes; flooding was not. This contrasts with the coverage provision for the Kodrins' home itself which was covered *unless* it was damaged by an enumerated exclusion, of which flooding was one. A named-peril provision requires the policyholder to prove that the claim is covered. Thus, the Kodrins had the burden of proof that the damage to or loss of the contents of their home was caused by wind.[20]

The district court instructed the jury that the Kodrins had the burden of proving that their claims were covered. Specifically, the jury charge included four individual elements that the Kodrins had to prove:

> 1) That a valid enforceable contract existed between the parties; 2) That the claim for damage being made under the policy *is covered by the policy;* 3) The amount of the claim for damages under the contract; and 4) that State Farm breached the policy by failing to pay a covered claim.[21]

The district court also instructed the jury that State Farm had the burden to prove the applicability of the exclusionary clause. State Farm protests that the district court did not provide a separate instruction regarding the burden of proof for the contents. Its argument appears to assume that the jury would interpret the instruction as to the exclusionary clause

to mean that State Farm had the burden of proof across the boards.

The language of the charge is plain, and State Farm's suggested instruction would be largely redundant. The district court instructed the jury in detail that the Kodrins had the burden of proving coverage and that this burden only shifted with respect to the exclusionary clause.[22] (The jurors had the policy in front of them.) As no exclusionary clause applied to the contents provision, the burden of proof obviously remained on the Kodrins. The interrogatories then separated out each of the categories of covered property so that the jury had to find with specificity that the cause of damage to each was wind if the Kodrins were to prevail.

The interrogatory relevant to contents asked: "Do you find by a preponderance of the evidence that Mr. and Mrs. Kodrin sustained wind damage to the contents of their home?" If the jury instruction left any doubt as to the burden of proof of the cause of contents damage or loss, this interrogatory made perfectly clear that, to recover, the Kodrins had to prove wind damage to their contents.[23] Indeed, the entirety of the Kodrins' position at trial was that wind, not flooding, caused every bit of their damage. There is no basis on which the jury could have thought that State Farm had the burden of proof with respect to that provision. The instruction properly placed the burden on the Kodrins for proving coverage as the result of wind damage, and there it remained with the sole exception of the exclusionary clause that had no applicability to contents. Thus, to hold otherwise would require not only abandoning the presumption that jurors follow instructions, but also assuming, with

no evidence or basis whatsoever, that these jurors acted in direct contravention to the charge given.

B. Bad Faith

1. Standard of Review

We review a district court's denial of a motion for judgment as a matter of law *de novo* and apply the same standards as the district court.[24] We construe the facts and draw all inferences in favor of the non-moving party, here, the Kodrins. We will reverse only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for a party."[25] Although our review is *de novo*, we afford "great deference" to the jury's verdict.[26]

2. Analysis

Under Louisiana law, an insurer owes its policyholder a duty of good faith in settling claims.[27] Failure to pay a claim within 30 days of being presented with satisfactory proof of loss is a breach of the duty if it is "arbitrary, capricious, or without probable cause."[28] In Louisiana, such a breach exposes the insurer to liability for damages and discretionary penalties under R.S. 22:1220 or to penalties and attorneys' fees under R.S. 22:658.[29] R.S. 22:1220 and 22:658 are penal in nature and must be construed strictly.[30]

The insured has the burden of proving that the insurer acted in bad faith.[31] Under the applicable statutes, "arbitrary and capricious" means "vexatiously," as in a "vexatious refusal to pay" or a refusal to pay without reason or justification.[32] An insurer does not act arbitrarily or capriciously when its refusal to pay a

claim is based on a genuine dispute over coverage or the amount of the loss.[33]

The only evidence that the Kodrins offered to demonstrate that this denial was in bad faith is the fact of the denial itself and their expert's testimony that wind actually caused the damage to the home. This is evidence that State Farm was wrong about the cause of damage, but without more, it is not evidence of bad faith. An insurer cannot be held to have acted in bad faith simply because it eventually turned out to be wrong about the cause of the damage.[34] "Where there is a serious dispute as to the nature of the loss, thus leaving the question of coverage in doubt, the insurer's refusal to pay the claim is not arbitrary, capricious or without probable cause."[35] Instead, the Kodrins had the burden of proving that State Farm withheld payment unjustifiably and without cause, and they failed to do so. For example, the Kodrins offered no evidence that State Farm believed that wind was likely the cause of the damage but nevertheless withheld payment.

State Farm denied payment to the Kodrins under their homeowner's policy on its determination that the home and its contents were destroyed by the storm surge (i.e., flooding), an excluded cause of loss.[36] State Farm declared that it determined flooding was the more likely cause of the damage to the home because (1) the Kodrins' neighborhood was inundated when a levee was overtopped during Hurricane Katrina, (2) the Kodrins' home was just one house away from that levee, and (3) many other houses in the area were lifted off their foundations and destroyed by the floodwaters. The Kodrins themselves acknowledged that their claimed wind damage to their home was unusual in their

neighborhood, advancing that a tornado must have caused the damage as their speculation why their home was the only one in the area destroyed by wind, not flooding. On these facts, we perceive no probative evidence that State Farm acted in bad faith. State Farm's refusal to pay was with reason,[37] even if the jury ultimately rejected that reason.[38] The Kodrins have failed to prove otherwise; they essentially ask this court to find bad faith any time an insurer denies coverage and a jury disagrees. This would unduly pressure insurers to pay out claims that they have reason to believe lie outside the scope of coverage, solely to avoid penalties later. Such a rule would pervert the presumption that insurers act in good faith unless the insured proves bad faith, and this is foreclosed by Louisiana law.[39]

Awards and penalties under R.S. 22:1220 and 22:658, including damages awarded under R.S. 22:1220 for mental anguish, require that the insurer be proved to have acted arbitrarily and capriciously in violation of these statutes. As we hold that, as a matter of law, the Kodrins failed to bear their burden of proving that State Farm acted in bad faith, we vacate the district court's awards of penalties and damages under R.S. 22:1220 and its award of attorneys' fees under R.S. 22:658.

III. CONCLUSION

We affirm the jury's finding of coverage and its award of damages for the loss of the Kodrins' home and its contents under the homeowner's policy. We vacate that portion of the court's judgment awarding penalties, damages, and attorneys' fees under R.S. 22:1220 and

22:658 resulting from the jury's finding of bad faith. We therefore remand this case to the district court with instructions to enter a revised judgment consistent with this opinion. AFFIRMED in part, VACATED in part, and REMANDED for entry of judgment in accordance herewith.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1The flood policy was issued through State Farm by the National Flood Insurance Program.

2Mr. Kodrin testified that State Farm tried to get him to settle the flood policy over the phone, even before sending an adjuster to inspect the property. The Kodrins said they hesitated to settle the flood claim for fear it would jeopardize their claim for wind damage.

3State Farm is a citizen of Illinois. The Kodrins are citizens of Louisiana.

4The total is slightly higher than the combined coverage limits. We have not divined the reason for this, but as State Farm does not raise the issue, we do not quibble with it.

5The $ 150,000 in damages and penalties were awarded under R.S. 22:1220.

6*Hyde v. Hoffmann La Roche Inc.*, 511 F.3d 506, 510

(5th Cir. 2007)

7*Baker v. Canadian Nat'l/Ill. Cent. R.R.*, 536 F.3d 357, 363-64 (5th Cir. 2008).

8 *Id.* at 364.

9 *Id.* at 363-64.

10 *Wright v. Ford Motor Co.*, 508 F.3d 263, 268 (5th Cir. 2007) (internal quotation marks and citation omitted).

11*Bilbe v. Belsom*, 530 F.3d 314, 316-17 (5th Cir. 2008) (applying *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419, 430 (5th Cir. 2007), to Louisiana law). The policy provision here at issue -- called an "anti-concurrent cause" provision -- bars recovery when wind and water act together or in sequence. *Id.*

12*Landry v. La. Citizens Prop. Ins. Co.*, 964 So. 2d 463, 477 (La. App. 3d Cir. 2007) ("[T]he fact that flood waters contributed to the damage or washes the property away does not compel a finding that flood damage was the efficient or proximate cause of the total loss."), *vacated in part on other grounds*, 983 So. 2d 66 (La. 2008); *see also Best v. State Farm Fire & Cas. Co.*, 969 So. 2d 671, 675 (La. App. 4th Cir. 2007) (quoting 11 COUCH ON INSURANCE 3d, § 153:17). The Kodrins reliance on *Roach-Strayhan-Holland Post No. 20, American Legion Club v. Continental Insurance Co. of New York* is misplaced. 237 LA. 973, 112 So. 2d 680 (La. 1959). The case interpreted a policy providing wind damage coverage following a windstorm and rejected consideration of the contribution of other factors, such as building decay, to the damage. *Id.* at 683. Although

the policy contained a water damage exclusion, the exclusion was not at issue, indeed the court noted that the windstorm policy was "*not otherwise limited or defined.*" *Id.*

13*See, e.g., FDIC v. Abraham*, 137 F.3d 264, 268-69 (5th Cir. 1998) (addressing instance of *intervening* contrary state appellate court decisions); *see also First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802, 809 (5th Cir. 1998) (decision of state intermediate court is a "datum for ascertaining state law," which must be considered by, but is not binding on this court). In this case, *Bilbe* was decided in 2008 after both *Landry* and *Best*.

14State Farm contends that the jury was left to contemplate that a wind-driven storm surge might have destroyed the home and, thus, to determine incorrectly that wind coverage was permissible. *See, e.g., Bilbe*, 530 F.3d at 317 n.3 ("The classic example of such a concurrent wind-water peril is the storm-surge flooding that follows on the heels of a hurricane's landfall."). In *Bilbe*, the plaintiff sought coverage under her homeowner's policy based on the contention that Hurricane Katrina's winds drove the storm surge that inundated her home. Finding "storm surge" to be essentially synonymous with "flooding," the court affirmed the denial of coverage. *Id.* at 316. In the instant case, we find no merit in State Farm's assertion: The Kodrins maintained that a pre-flood tornado, not a wind-driven storm surge, destroyed their home.

15It is important to distinguish between this dispute over which force totally destroyed a home and cases in which the parties disagree as to the causes of various

damaged elements of a home. Distinct elements of damage would have to be considered separately. Flood-damaged carpets, for example, would not bar recovery for a wind-damaged roof.

16They asked: "Do you find by a preponderance of the evidence that Mrs. Kodrin sustained wind damage to any other structure on her property?" and "Do you find by a preponderance of the evidence that Mr. and Mrs. Kodrin sustained wind damage to the contents of their home?"

17*Russell v. Plano Bank & Trust*, 130 F.3d 715, 721 (5th Cir. 1997) (*quoting United States v. Fletcher*, 121 F.3d 187, 197 (5th Cir. 1997)).

18*FDIC v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994) (internal quotation marks and citation omitted).

19*Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 207 (5th Cir. 1983).

20*See, e.g., Best v. State Farm Fire & Cas. Co.*, 969 So. 2d 671, 675 (La. App. 4th Cir. 2007) (quoting *Carriere v. Triangle Auto Serv.*, 340 So. 2d 665, 666 (La. App. 4th Cir. 1976)); *see also Opera Boats, Inc. v. La Reunion Francaise*, 893 F.2d 103, 105 (5th Cir. 1990)

21 Emphasis added.

22State Farm conflates this case with those in which plaintiffs proved only that damage was caused by a hurricane and insisted that was sufficient proof to bring a claim within coverage of a homeowner's policy. *See, e.g., Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d

618, 624-25 (5th Cir. 2008). In *Broussard*, the plaintiff claimed to have fulfilled his burden by proving, without more, that the damage to his personal property resulted from Hurricane Katrina. We held that the plaintiff had to go further and prove that the damage was caused by a named peril, i.e., wind. *Id. Broussard* is inapposite to the instant case because there is no question that here the jury was instructed that the Kodrins had to do more than demonstrate the claimed damage was caused by a hurricane.

23We construe the jury charge and interrogatories as a whole. *Baker v. Canadian Nat'l/Ill. Cent. R.R.*, 536 F.3d 357, 363 (5th Cir. 2008); *Consol. Cigar Co. v. Tex. Commerce Bank*, 749 F.2d 1169, 1173 (5th Cir. 1985) ("[T]he test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of [the] issues and its duty to determine [the] issues.").

24*Baker*, 536 F.3d at 362.

25*Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 486 (5th Cir. 2004).

26*Id.*

27L A. REV. STAT. § 22:1220 (2007).

28L A. REV. STAT. § 22:658(B)(1) (2007). Under R.S. 22:658(B)(1) "[f]ailure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor . . . when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty . . . as well

as reasonable attorney fees and costs." An insurer is liable under R.S. 22:1220(B)(5) for "failing to pay the amount of any claim due any person insured by the contract *within sixty days* after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause." Emphasis added.

29A plaintiff may get penalties under only one of the two statutes, whichever is higher, although he may get attorneys' fees under R.S. 22:658 if he is awarded penalties under R.S. 22:1220. *Calogero v. Safeway Ins. Co. of La.*, 753 So. 2d 170, 174 (La. 2000).

30*Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 206 (La. 2008).

31*Reed v. State Farm Mut. Auto Ins. Co.*, 857 So. 2d 1012, 1021 (La. 2008).

32*Id.*

33*Id.; see Saavedra v. Murphy Oil U.S.A., Inc.*, 930 F.2d 1104, 1111 (5th Cir. 1991).
34*Icklone v. Travelers Indem. Co.*, 345 So. 2d 202, 203 (La. App. 3d Cir. 1977) ("Penalties may not be assessed merely because the insurer is the unsuccessful litigant in a lawsuit.").

35*Id.* At least one Louisiana court has held that when the cause of damage is hotly contested at trial this is evidence that the insurer *did not* act in bad faith. *Block v. St. Paul Fire & Marine Ins. Co.*, 742 So. 2d 746, 755 (La. App. 2d Cir. 1999).

36*See, Bilbe v. Belsom*, 530 F.3d 314, 317 (5th Cir. 2008).

37*Molony v. USAA Prop. & Cas. Ins. Co.*, 708 So. 2d 1220, 1226 (La. App. 4th Cir. 1998) (insurer's refusal to pay is not arbitrary and capricious "if there is a reasonable dispute between the insurer and insured as to the amount of a loss."). In this case, the dispute was over the all-or-nothing cause of the loss, not over some combined cause.

38A determination of whether an insurer acted in good faith is based on the information known to the insurer at the time it refused payment. *La. Bag Co., Inc. v. Audubon Indem. Co.*, 975 So. 2d 187, 2008 WL 5146674, at *7 (La. 2008).

39We caution insurers, however, that simply denying coverage on the basis that damage was caused by an excluded peril is not a route to avoiding R.S. 22:1220 and 22:658 penalties and fees. We decide this case on the Kodrins' failure to present evidence legally sufficient to prove bad faith.

CIVIL ACTION NO. 06-8180 SECTION: J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JUDY KODRIN, ET AL

VERSUS

STATE FARM INSURANCE COMPANY, ET AL

January 31, 2008, Decided
January 31, 2008, Filed

CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

ORDER AND REASONS

Before the Court is Plaintiffs Judy and Michael Kodrin's **Memorandum Regarding Attorney Fees and Costs (Rec. Doc. 132).** Plaintiffs seek an award of attorneys fees, costs, and expenses pursuant to this Court's November 21, 2007 Judgment in their favor. Defendant State Farm Fire and Casualty Company ("State Farm") opposes such an award. Upon review of the record, the memoranda of counsel, and the applicable law, this Court now finds, for the reasons set forth below, that attorneys fees and costs should be awarded in the following manner and amounts.

Background Facts

Plaintiffs filed their Petition for Damages in state court in the 25th Judicial District for the Parish of Plaquemines, State of Louisiana, and named as

Defendant, State Farm. Plaintiffs alleged that their property suffered damages as a result of Hurricane Katrina. This property was covered by a homeowners' policy with Defendant. Plaintiffs notified Defendant of their losses, but Defendant refused to tender payment up to the policy limits.

Defendant removed the action to federal court and, following a jury trial, judgment was awarded in favor of Plaintiffs in the amount of $ 356,317.96, with legal interest from the date of judicial demand, plus reasonable attorneys fees pursuant to La. R.S. 22:658. In an order issued contemporaneously with the Judgment, this Court explained that plaintiffs are entitled to recover reasonable attorneys fees which were incurred more than 30 days beyond the August 15, 2006 effective date of the amended version of La. R.S. 22:658. Therefore, the only issue before this Court is the determination of the amount of attorneys fees and costs that Plaintiffs are entitled to recover.

The Parties' Arguments

Plaintiffs assert two alternative bases by which this Court can calculate attorneys fees. First, Plaintiffs state that the Court may award attorneys fees based on a contingency fee. Plaintiffs cite *Hymel v. HMO of Loa, Inc.* in support. 951 So. 2d 187 (La. App. 1st Cir. 2006) (awarding attorneys fees under La. R.S. 22:658 based upon the contingency fee contract); see also *Gilbeau v. Bayou Nursing Ctr.*, 930 So. 2d 1167 (La. App. 3d Cir. 2006) (awarding attorneys fees of 33 1/3 percent based upon a contingency fee contract, given that plaintiffs' attorney assumed financial responsibility, filed suit, conducted discovery). As a Louisiana state court has found, "[b]asing the award on what the plaintiff is

contractually obligated to pay is a reasonable approach." *Short v. Plantation Mgmt. Corp.*, 781 So. 2d 46, 65-66 (La. App. 1st Cir. 2000). Plaintiffs testified at trial that their fee contract provided for a contingency fee of forty percent. The total judgment awarded in this case was $ 356,317.96. Forty percent of this award equals $ 142,527.18.

Alternatively, Plaintiffs state that the contract [1] entered into between Plaintiffs and counsel specified an hourly rate of $ 300 for partner time, $ 200 for associate time, and $ 100 for paralegal time. [2] Plaintiffs state that this rate is within the normal range for this type of case. As of December 5, 2007, Plaintiffs' counsel expended 279.5 hours of partner time, 505.75 hours of associate time, and 255.25 hours of paralegal time, for a total amount of $ 210,525.00. [3] As the hourly fee is higher than the contingency fee, plaintiffs claim they are contractually obligated to pay $ 210,525.00 in attorneys fees. As a result, Plaintiffs ask this Court to enter an award based on the hourly fee.

In addition, Plaintiffs contend they are entitled to recover costs under Louisiana state law as a consequence of State Farm's bad faith as well as federal law, including, but not limited to, 28 U.S.C. § 1920. Plaintiffs assert that such costs include deposition costs, *E.E.O.C. v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000), filing fees, *id.* at § 1920(1)&(5), photocopying costs and document production as is reasonably necessary for use in the case, *Billings v. Cape Cod Child Development Program*, 270 F. Supp. 2d 175 (D. Mass. 2003), legal research, *U.S. v. Adkinson*, 256 F. Supp. 2d 1297 (N.D. Fla. 2003), and trial transcripts, *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 362 F.2d 799 (2d Cir. 1966). Plaintiffs also state that they incurred the

expense of hiring experts to prove their case, including a trial technician and a jury consultant. To date, Plaintiffs have incurred $ 39,379.91 in costs and expenses.

In sum, Plaintiffs request a fee award of $ 210,525.00 based on the hourly fee and an additional $ 39,739.91 in costs.

In opposition, State Farm argues that contrary to this Court's order, Plaintiffs have not submitted a motion on attorneys fees and costs, but have merely submitted an unverified memorandum. Regardless, State Farm opposes Plaintiff's calculation of fees based on both the contingency fee contract and the hourly fee as both are "clearly excessive and unreasonable."

State Farm cites *Geraci v. Byrne* in support of its assertion that an arrangement between a plaintiff and an attorney for fees equaling a percentage of the recovery is not determinative of the amount owed. 934 So. 2d 263 (La. App. 5th Cir. 2006). State Farm points out that the instant case was a three day trial without extensive discovery.

Furthermore, according to State Farm, the hourly rates charged by Plaintiffs' counsel are excessive for a property damage insurance breach of contract claim. State Farm also challenges individual billing entries as excessive, noting an inordinate amount of time charged for drafting and revising the Petition for Damages, multiple timekeepers for the same entries, and an unnecessary and excessive amount of time spent on discovery motions. State Farm further states that Plaintiff's quarter hour minimum billing period is unreasonable and has likely resulted in overbilling, as many tasks take less than fifteen minutes to complete.

State Farm suggests that the maximum reasonable contingency fee should be 33 percent. Alternatively, the hourly charges should be adjusted and reduced to lower the per hour charge, to not allow for duplicate billing by multiple timekeepers, and to not allow for excessive charges. Instead of an hourly rate of $ 300 for partner time, $ 200 for associate time, and $ 100 for paralegal time, State Farm suggests an hourly rate of $ 200 for partner time, $ 150 for associate time, and $ 90 for paralegal time.

As for costs, State Farm asserts that Plaintiffs cannot recover costs beyond those authorized by 28 U.S.C. 1920. That statute limits taxation of costs to: (1) fees of the clerk and marshal, (2) fees of the court reporter for stenographic transcription necessarily obtained in the case, (3) fees and disbursements for printing and witnesses, (4) fees for copies of papers necessarily obtained for use in the case, (5) docket fees, (6) and compensation of court appointed experts. However, according to State Farm, Plaintiffs have included multiple items that are not allowed as court costs under section 1920.

Discussion

This Court's order dated November 21, 2007 (Rec. Doc. 126), issued contemporaneously with the Judgment, stated that plaintiffs were to file a properly supported motion for attorneys fees and costs. No such motion was filed, as Plaintiffs have submitted instead a memorandum regarding attorneys fees and costs (Rec. Doc. 132). However, this Court hereby construes Plaintiffs' filing as a motion for attorneys fees and costs.

In the Fifth Circuit, state law controls both the award of and the reasonableness of fees awarded when state law supplies the rule of decision. *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002). Therefore, this Court must look to Louisiana law when determining the amount of, and the reasonableness of attorneys fees.

In assessing the reasonableness of attorneys fees, there are ten factors that are to be taken into account. *State of Louisiana, Department of Transportation and Development v. Williamson*, 597 So. 2d 439, 442 (La. 1992). These include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge. *Id.* at 442.

Further, while a court may consider an attorney-client contract among other factors, it is not bound by such an agreement in determining reasonable attorneys fees. Rather, the court should consider "the entire record, including discovery, pretrial motions, the legal issues involved and the length of trial." *Richardson v. Parish of Jefferson*, 727 So. 2d 705, 707 (La. App. 5th Cir. 1999). Therefore, because an hourly rate more properly takes the relevant factors into account, an hourly rate is the proper way to award reasonable attorneys fees in this matter.

Examining the record in light of the above mentioned factors beginning with the first factor, the ultimate result for Plaintiffs was good. Plaintiffs prevailed at trial on the merits and were awarded a total of $

356,317.96. Additionally, this litigation did have some importance beyond the interests of the parties. Being the first Katrina-related federal jury trial against State Farm and only the second against any insurance carrier in the Eastern District of Louisiana, the case involved numerous legal and factual issues pertaining to whether damages were caused by Hurricane Katrina's winds (covered by the policy) or by storm surge flooding (not covered by the policy). In addition, the case involved legal issues pertaining to the calculation of damages and penalties under La. R.S. 22:658 and 22:1220.

As to the extent and character of the work performed, there were an extensive amount of pre-trial motions filed. And Plaintiffs' counsel did file suit, take numerous depositions, engage in written discovery, hire experts, try the case, and oppose post-trial motions by the Defendant.

However, the timesheet submitted by Plaintiffs' counsel contains some problematic entries. First, this Court notes that Plaintiffs' counsel has failed to provide proper support in the form of supporting affidavits for their requested hourly rates. Second, the timesheet reflects instances of billing by more than one attorney for the same task, billing in quarter hour increments, as well as excessive amounts of time spent on many tasks, such as drafting the petition and the pre-trial order. In this way, the timesheet lacks evidence of "billing judgment." [4]

The Fifth Circuit instructs that compensable hours are determined from the attorney's time records and include all hours reasonably spent. *Shipes v. Trinity Industries*, 987 F.2d 311, 319 (5th Cir. 1993). Counsel is then required to exercise billing judgment to exclude

from the fee request any "hours that are excessive, redundant or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 432-35, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). If there is no evidence of billing judgment, however, then the proper remedy is not a denial of fees, but a reduction of the hours awarded by a percentage intended to substitute for the exercise of billing judgment. *Walker*, 313 F.3d at 251 (citations and quotation marks omitted). This Court determines that 25 percent is the appropriate reduction in this case.

However, the analysis does not stop here. Attorney's fees must be calculated at the "prevailing market rates in the relevant community for similar services by attorneys of reasonably comparable skills, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The applicant bears the burden of producing satisfactory evidence that the requested rate is aligned with prevailing market rates. *Id.* Satisfactory evidence of the reasonableness of the rate necessarily includes an affidavit of the attorney performing the work and information of rates actually billed and paid in similar lawsuits. *Id.* at 896 n.11. However, mere testimony that a given fee is reasonable is not satisfactory evidence of a market rate. See *Hensley*, 461 U.S. at 439 n.15.

As mentioned above, Plaintiffs' counsel have failed to submit supporting affidavits. Therefore, this Court substitutes reasonable hourly rates based on what has been awarded in similar cases. In *Dickerson v. Lexington Insurance Co.*, this Court awarded $ 225 per hour for partner time and $ 175 per hour for associate time. No. 06-8056, 2007 U.S. Dist. LEXIS 66566, 2007 WL 2670269 (E.D. La. Sept. 7, 2007). State Farm

suggests that $ 90 per hour for paralegal time is a reasonable rate, and this Court agrees.

As a result, reducing the hourly rates accordingly, the total hourly fee equals $ 174,366.25, down from $ 210,525.00. Applying the 25 percent reduction for failure to exercise billing judgment, Plaintiffs are to be awarded attorneys fees, including paralegal fees, in the amount of $ 130,774.69.

Plaintiffs also seek the recovery of costs in the amount of $ 39,379.91. In a diversity case, federal law controls in regard to the assessment of costs. *Chaparral Resources, Inc. v. Monsanto Company*, 849 F.2d 1286 (10th Cir. 1988). "[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). A court may tax as costs only the following: (1) fees of the clerk and marshal, (2) fees of the court reporter for all or part of the stenographic transcript necessarily obtained for use in the case, (3) fees and disbursements for printing and witnesses, (4) fees for copies of papers necessarily obtained for use in the case, (5) docket fees, (6) and compensation of court appointed experts. 28 U.S.C. 1920. While the Court recognizes this may sometimes be inequitable, allowable costs are limited to these categories, and expenses that are not authorized by statute must be borne by the party incurring them. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

This court now turns to an assessment of the costs requested by Plaintiffs. Costs such as filing fees and fees for service of process effected by the marshal are recoverable, as are copying expenses for bench books, as such copies are necessarily obtained for use in the

case. Therefore, Plaintiffs are entitled to recover the amounts of $ 252.50 and $ 2,989.99, respectively.

However, delivery charges are not listed in 28 U.S.C. 1920 and are generally not awarded without additional support in the record. *Jones v. White*, No. 03-2286, 2007 U.S. Dist. LEXIS 61685, 2007 WL 2427976 (S.D. Tex. Aug. 22, 2007). In this case, Plaintiffs have not provided support for awarding delivery costs; therefore, delivery charges totaling $ 1,450.66 are not recoverable.

Fees for deposition transcripts are clearly contemplated by 28 U.S.C. 1920. However, using the receipts provided by Plaintiffs, the total charges for deposition transcripts equal $ 4,817.14, not $ 5,019.81 as requested by Plaintiffs. Therefore, only $ 4,817.14 will be awarded. As for deposition appearances, costs related to the taking of depositions are allowed if the materials were necessarily obtained for use in the case. *Stearns Airport Equipment Co., Inc. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999). However, State Farm paid these expenses totaling $ 1,264.80 for Winston Wood, $ 720 for Patrick Kaminski, and $ 900 for James Danner; therefore, Plaintiffs cannot seek to charge them to State Farm again.

The expenses associated with trial consultants hired by Plaintiffs are also not chargeable to State Farm. *Freier v. Freier*, 985 F. Supp. 710 (E.D. Mich. 1997). Therefore, Plaintiffs' request for $ 12,800 in trial consultant fees must deducted from the amount of costs awarded.

As for expert witness fees, when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. 1821(b) which limits an award of expert witness

fees to $ 40 per day plus travel expenses. As for fees associated with an expert's preparation for and giving of depositions, experts are also entitled to $ 40 per day plus travel costs. *Canion v. U.S.*, No. 03-347, 2005 U.S. Dist. LEXIS 21265, 2005 WL 2216881 (W.D. Tex. Sept. 9, 2005). Therefore, expert Neil Hall's fees of $ 8,219 must be reduced to $ 167. [5] Plaintiffs also include an invoice for $ 3,835.71 for a property appraisal by David G. Dye & Associates, L.L.C. As with Neil Hall, Mr. Dye is entitled to $ 40 per day plus his travel expenses associated with attending his two depositions. This amounts to $ 233.40.

Plaintiffs also include costs associated with demonstrative exhibits. However, such costs are not recoverable. Therefore, the invoice from VenuDocket for trial boards and transparent overlays totaling $ 1,388.66 cannot be charged to State Farm. See *Young v. Dallas Area Rapid Transit*, No. 95-2596, 1999 U.S. Dist. LEXIS 5834, 1999 WL 242694 (N.D. Tex. April 16, 1999).

Also, miscellaneous expenses such as travel expenses, parking, and attorney meals are also not recoverable under Section 1920. *Ducote Jax Holdings, L.L.C. v. Bank One Corp.*, No. 04-1943, 2007 U.S. Dist. LEXIS 87367 (E.D. La. Nov. 28, 2007); *Jimenez v. Paw-Paw's Camper City, Inc.*, No. 00-1756, 2002 U.S. Dist. LEXIS 3248 (E.D. La. Feb. 22, 2002).

Therefore, Plaintiffs are to be awarded costs in the amount of $ 8,459.70. Accordingly,

IT IS ORDERED that Plaintiffs' **Memorandum Regarding Attorney Fees and Costs (Rec. Doc. 132)** should be and is hereby **GRANTED** insofar as Plaintiffs are to be awarded attorneys fees, including

paralegal fees, in the amount of $ 130,774.69, and costs in the amount of $ 8,459.70.

New Orleans, Louisiana this 31st day of January, 2008.

/s/ Carl J. Barbier

CARL J. BARBIER

UNITED STATES DISTRICT JUDGE

Foonotes

1 According to this contract, Plaintiffs are obligated to pay whatever amount is higher; the contingency fee or the hourly fee.

2 Plaintiffs seek an award for paralegal time if the Court decides to award fees hourly rather than based on the contingency fee contract.

3 Plaintiff attaches a timesheet in support of its calculation.

4 *See Walker v. City of Mesquite* in which the Fifth Circuit found that there was no evidence of the exercise of billing judgment because the time and billing records "did not document both the hours charged and the hours written off. 313 F.3d 246, 251 (5th Cir. 2002).

5 Plaintiffs included an invoice for Mr. Hall to attend the deposition of State Farm's expert, James Danner. Since Mr. Hall's presence was not required at this deposition, this is not a properly taxable cost. Plaintiffs also submitted invoices for Mr. Hall's preparation for his deposition, travel and site inspection, and preparation of his written report which are not

recoverable under Section 1920. See *Jarrells v. New Orleans Shirt Co., Inc.*, No. 87-4688, 1988 U.S. Dist. LEXIS 5713, 1988 WL 65571 (E.D. La. June 9, 1988).

CIVIL ACTION NO: 06-8180 SECTION: J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JUDY KODRIN, ET AL

VERSUS

STATE FARM INSURANCE COMPANY, ET AL

November 21, 2007, Decided
November 21, 2007, Filed

CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

ORDER

On November 7, 2007 a jury returned a verdict in favor of plaintiffs Judy and Michael Kodrin on their claims against their homeowner's insurer, State Farm Fire and Casualty Company, for the destruction of their home as a result of Hurricane Katrina. The jury awarded damages as follows for breach of contract:

Dwelling	$ 106,260.00
Other structures	10,626.00
Personal contents	79,695.00
Additional living expenses	9,736.96

Since Judy Kodrin was the sole owner of the house, she is entitled to recover the amounts awarded for the dwelling and other structures. The personal property

or contents were owned jointly by the Kodrins, and the additional living expenses were incurred jointly.

In addition, the jury found that State Farm's failure to pay the Kodrins' claims within 30 or 60 days from proof of loss was arbitrary, unreasonable, and in bad faith. Accordingly, the jury determined that State Farm was liable under both La. R.S. 22:658 and 22:1220, which provide for certain penalties for bad faith insurance claims handling practices. The amount of the penalties under 22:658 was left for the Court to calculate. Pursuant to 22:1220, the jury awarded Judy and Michael Kodrin each the sum of $ 25,000 in general damages and double that amount, or $ 50,000 in penalties.

Louisiana law is clear that plaintiffs may not recover penalties under both statutes, but are entitled to the higher penalty under one or the other statute. *Calogero v. Safeway Insurance Co.*, 753 So. 2d 170, 174 (La. 2000). The Court finds that the higher penalties in this instance are those awarded by the jury under 22:1220, which total $ 75,000 for each plaintiff.

However, because 22:1220 does not provide for attorney fees, plaintiffs may be entitled to recover attorney fees under R.S. 22:658. *Id.* At the time of Katrina, this statute provided for a penalty of 25% of the amount due, but did not allow for recovery of attorney fees. Subsequent to Hurricane Katrina, and in obvious response to the difficulties that many Louisiana homeowners had encountered in resolving their hurricane insurance claims, the legislature amended the statute to increase the penalties from 25% to 50%, and to allow for recovery of reasonable attorneys fees. The question presented is whether or not the amended

statute, which became effective August 15, 2006, is applicable in this case.

Louisiana courts have recently held that the 2006 amendments were substantive and not retroactive. *Sher v. Lafayette Insurance Co.*, So. 2d , 973 So. 2d 39, 2007 La. App. LEXIS 2245 (La. App. 4th Cir., No. 2007-CA-0757 , November 19, 2007); see also *Conlee v. Fireman's Fund Ins. Co.*, No. 07-660, 2007 U.S. Dist. LEXIS 52080, 2007 WL 2071860 (E.D. La. July 17, 2007); *Empire Inn, L.L.C. v. State Farm Fire and Cas. Co.*, No. 06-4939, 2007 U.S. Dist. LEXIS 69362, 2007 WL 2751203 (E.D. La. Sept. 18, 2007). Accordingly, the amended statute cannot be applied retroactively to bad faith conduct occurring before the effective date. However, in Louisiana an insurer owes its insured a continuing duty of good faith and fair dealing. *Conlee*, 2007 U.S. Dist. LEXIS 52080, 2007 WL 2071860. In the context of the instant case, the evidence and jury verdict lead to only one reasonable conclusion, i.e., State Farm breached its duty to handle the Kodrins' claims in good faith, by not paying their claims within 30 days from proof of loss. Since State Farm had a continuing duty to fairly evaluate and adjust the Kodrins' claims, the bad faith conduct occurred both before and after the effective date of the amended 22:658. Applying the amended statute prospectively, the Court concludes that plaintiffs are entitled to recover reasonable attorneys fees which were incurred more than 30 days beyond the August 15, 2006 effective date of the amended statute. While the Court is aware that other cases have held that only the version of the statute in effect at the time of the original breach can apply, [1] this interpretation of the amendments does not seem to be justified by the obvious purpose of the

legislative amendments increasing the penalty and providing for recovery of attorneys fees. If the notion of a "continuing duty" has meaning, then an insurer who initially denies a claim cannot simply ignore its continuing obligation to its own policyholder to further investigate or review the pending claim. Continuing to act unreasonably by failing to pay a legitimate claim even after the legislature acted to increase the penalties for such behavior seems to be precisely the conduct that the legislature sought to address.

A final judgment will be entered in accordance with the jury verdict and this order. Counsel for plaintiffs shall file a properly supported motion for attorneys fees and costs within 20 days from entry of the final judgment. Defense counsel shall file any opposition within 10 days thereafter.

New Orleans, Louisiana this the 21st day of November, 2007.

/s/ Carl J. Barbier

CARL J. BARBIER

UNITED STATES DISTRICT JUDGE

Footnote

1 See, e.g., *Empire Inn*, 2007 U.S. Dist. LEXIS 69362, 2007 WL 2751203; *Ferguson v. State Farm Ins. Co.*, No. 06-3936, 2007 U.S. Dist. LEXIS 34030, 2007 WL 1378507 (E.D. La. May 9, 2007).

CIVIL ACTION NO: 06-8180 SECTION: J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JUDY KODRIN, ET AL

VERSUS

STATE FARM INSURANCE COMPANY, ET AL

JURY INTERROGATORIES

I. BREACH OF INSURANCE CONTRACT

1. Do you find by a preponderance of the evidence that Mrs. Kodrin sustained wind damage to her home?

ANSWER: YES

Please proceed to question 2.

2. Do you find by a preponderance of the evidence that Mrs. Kodrin sustained wind damage to any other structure on her property?

ANSWER: YES

Please proceed to question 3.

3. Do you find by a preponderance of the evidence that Mr. and Mrs. Kodrin sustained wind damage to the contents of their home?

ANSWER: YES

If you answered "NO" to questions 1, 2, and 3, then skip the remaining questions, date and sign this form, and return to the courtroom. If you answered "YES" to any of these questions, please proceed to question 4.

4. What amount does State Farm owe Mr. and/or Mrs, Kodrin for wind loss to their property?

Dwelling: max ($106,260)
Other Structures: ($10,262)
Dwelling Contents: max ($79,695)
Additional Living Expenses: $9736

Please proceed to question 5.

II. CLAIMS HANDLING - SECTION 22:658

5. Do you find by a preponderance of the evidence that State Farm arbitrarily, capriciously, or without probable cause failed to pay or offer in writing to settle Mr, and Mrs. Kodrin's claims on their homeowner's policy within thirty days of receiving a satisfactory proof of loss?

ANSWER: YES

If you answered "YES" to question 5, please proceed to question 6. If you answered "NO" to question 5, then please proceed to question 7.

6. What amount of money do you find was not paid by State Farm within thirty days of receiving a satisfactory proof of loss for the following?

Dwelling: max ($106,260)
Other Structures: ($10,262)
Dwelling Contents: max ($79,695)
Additional Living Expenses: $9736

Please proceed to question 7.

III. CLAIMS HANDLING - SECTION 22:1220

7. Do you find by a preponderance of the evidence that State Farm arbitrarily, capriciously, or without probable cause failed to pay the amount due on Mr. and Mrs. Kodrin's homeowner's claims within sixty days after it received satisfactory proof of loss?

ANSWER: YES

If you answered "YES" to question 7, please proceed to question 8. If you answered "NO" to question 7, then skip the remaining questions, date and sign this form, and return to the courtroom.

8. Do you find by a preponderance of the evidence that Mr. and/or Mrs. Kodrin suffered damages as a result of State Farm's failure to pay the amount due on their homeowner's claims within sixty days after it received satisfactory proof of loss?

As to Mrs. Kodrin:

ANSWER: YES

As to Mr. Kodrin:

ANSWER: YES

If you answered "YES" to any part of question 8, please proceed to question 9. If you answered "NO" to both parts of question 8, then please proceed to question 10.

9. What amount of damages do you find Mr. and/or Mrs. Kodrin suffered as a result of State Farm's failure to pay the amount due on their homeowner's claims within sixty days after it received satisfactory proof of loss?

As to Mrs. Kodrin:
Damages: $25k

As to Mr. Kodrin:
Damages: $25k

Please proceed to question 10.

10. What is the amount of penalty, if any, you award to Mr. and/or Mrs. Kodrin for State Farm's failure to pay the amount due on their homeowner's claims within sixty days after it received satisfactory proof of loss? This amount may be up to two times the amount of damages determined in question 9, or $5,000, whichever is greater, for each claimant.)

As to Mrs. Kodrin:
Penalty: $50k

As to Mr. Kodrin:
Penalty: $50k

Please sign and date the verdict form and return to the courtroom.

New Orleans, Louisiana, this day of November,

2007.

FOREPERSON

Filed 4/22/09
No. 08-30092, consolidated w/08-30169
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUDY KODRIN; MICHAEL KODRIN,
Plaintiffs - Appellees

v.

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana. USDC No. 2:06-CV-8180.

ON PETITION FOR REHEARING

Before KING, HIGGINBOTHAM, and WIENER, Circuit Judges.

PER CURIAM

IT IS ORDERED that the petition for rehearing is DENIED.